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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 58

JOHN E. HODGES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the district court (R. 6-8) is reported at 156 F. Supp. 313. The initial opinion of the court of appeals (R. 141-146) is reported at 282 F.2d 864 as an appendix to the opinion of the court of appeals on rehearing *en banc*. The opinion of the court of appeals on rehearing *en banc* (R. 148-161) is reported at 282 F.2d 858.

Jurisdiction

The initial judgment of the court of appeals was entered on December 30, 1959 (R. 147). A petition for rehearing, timely filed, was granted on April 15, 1960 (R. 146). The judgment of the court of appeals on rehearing *en banc* was entered on July 21, 1960 (R. 162). The petition for a writ of certiorari was filed on September 14, 1960, and was granted on February 20, 1961 (R. 164). 365 U.S. 810. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioner seeks to attack his federal conviction collaterally under 28 U.S.C. §2255 on the ground that it was based on a coerced confession.

The question presented is whether his right to collateral attack on this ground is extinguished because he failed to appeal directly from his conviction for the reason that he neither knew nor was advised by counsel of his appellate rights.

Statute Involved

28 U.S.C. §2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move

the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such a court has denied him relief,

unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement

On July 15, 1957, petitioner John E. Hodges was convicted of robbery[1] on the basis of a confession admitted in evidence over his objection that it had been coerced (R. 82). Both opinions of the court of appeals (that of the panel (R. 141-146) and of the court on rehearing *en banc* (R. 148-161)) assumed *arguendo* that the confession was, in fact, coerced. Following the court of appeals, we, too, shall assume that the confession was coerced since the question of coercion *vel non* is not before the Court in the present posture of the case. A summary of the facts surrounding the prisoner's confession is, however, given in a footnote.[2]

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[1] The robbery which petitioner is alleged to have committed occurred on July 30, 1955, in Washington, D. C., when a cashier at Briggs and Company was held up and $4,950 taken from him (R. 23-24).

[2] At the time John Hodges was arrested, he was living with his wife and child in Chicago (R. 51). At the request of the Washington police, the Chicago police on Sunday evening, April 29, 1956, went to John Hodges' home and arrested him without a warrant (R. 25-26). Not until the afternoon of May 2, 1956, three days later, was Hodges turned over to two Washington policemen who had flown in from Washington (R. 38-40). During his three-day incarceration by the Chicago police, Hodges was put through a series of interrogations, awakened in the middle of the night, forced to sleep on a cell-block floor, and, on three different occasions, physically beaten (R. 27, 56-61, 72, 116-122, 129). Without the benefit of counsel, he was held incommunicado during this entire period and was denied permission even to call his wife (R. 61, 123). His wife's persistent and repeated efforts to communicate with her husband by calling the police also proved unavailing (R. 52-53). Despite this treatment, Hodges persistently and consistently denied any participation in the robbery throughout this entire period (R. 56-61, 71-72, 116-121, 122, 128-129).

When he was turned over to the Washington police, the Washington police took Hodges into a small room off of the Chicago

This coerced confession was the only evidence introduced at the trial connecting the petitioner with the alleged offense. On this basis, he was convicted by a jury and sentenced by the court to a term of imprisonment of from four to thirteen years (R. 1).

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police headquarters and again charged him with the robbery (R. 72, 100). Again he denied the charge (R. 72, 100). The Washington police then showed him a confession by Thomas Straymer and told him that his brother, Frank Hodges, had also confessed and that both confessions implicated him (R. 72-73). Again they asked him to sign a confession (R. 73). Again he replied that he had nothing to do with the robbery and was not going to sign a confession (R. 73, 100).

Then the police played their trump card: "If that is the case, we will just have to turn you back to the Chicago police" (R. 73). Under this threat, John Hodges broke and signed the confession (J. A. 73, 75). Although they took the stand, the record contains no specific denial of this threat by the Washington police.

It is interesting to note that a United States Commissioner's warrant had been issued for Hodges' arrest prior to the time the Washington police left for Chicago (R. 47, 105-106). The Washington police did not request the United States Marshal to transmit this warrant to Chicago because, according to the testimony of one of the policemen, that would have prevented the police from interrogating Hodges (R. 48, 50, 105-106). In the officer's own words, "We wanted to talk to Hodges, and we knew that if the Commissioner's warrants were served, we would not be able to talk to them [petitioner and his brother] until they got back here in Washington" (R. 48). And their avowed purpose was not simply to bring Hodges back to Washington. On the contrary, their only purpose in going to Chicago, as another officer testified, was, "to talk to John in order to get a confession from him" (R. 106).

The following morning, May 3, petitioner was flown back to Washington; but it was not until Friday, May 4, five days after his arrest, that he was finally arraigned (R. 45-46, 49, 65-66). (This delay in arraignment is, of course, a plain violation of the rule established in *Mallory* v. *United States*, 354 U.S. 449 (1957), which invalidated a conviction based on a confession obtained during a delay prior to arraignment of only a few hours. Unfortunately, this decision was not handed down until almost two months after the conviction and sentencing of the defendant in this case. Because of the fact that the erroneous admission of a *Mallory* confession is not a constitutional violation, we have not

No appeal was taken from this conviction, for reasons which will subsequently be discussed, *infra*, pp. 7-8.

Less than three and a half months after sentence was imposed, petitioner filed a motion under 28 U.S.C. §2255 to vacate his sentence on the ground that his conviction had been based on a coerced confession in violation of his constitutional rights (R. 1-3). After a hearing, the district court denied the motion (R. 6-8).

On appeal, a panel of the court of appeals affirmed (R. 141-146). Assuming that petitioner's confession was involuntary (R. 142), the court ruled that a conviction based upon a coerced confession was not subject to collateral attack under Section 2255 " . . . when no appeal has been prosecuted from the judgment of conviction and no reason advanced for the omission to appeal . . . " (R. 145). Accordingly, the court felt " . . . constrained in the present status of Supreme Court decisions to hold that in this case collateral attack is not available in the complete absence of any attempt to excuse the failure to appeal . . . " (R. 146).

Petitioner sought rehearing on the narrow ground that the court had failed to consider his proffered[3] explanation

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pressed this error at this stage in the habeas corpus proceeding in view of the fact that the confession was also coerced.)

[3] A word should be said regarding the record on appeal. When present counsel were appointed by the court of appeals to represent petitioner, it was discovered that the reporter's notes of the Section 2255 hearing had been lost (R. 125). The court of appeals, being "of the view that the issues on this appeal can be adequately determined by reference to the transcript of the trial proceedings," ordered that transcript prepared and filed as a supplemental record on appeal (R. 12).

Although the trial transcript did contain evidence regarding the circumstances in which the confession was obtained, it did not, of course, reveal the circumstances surrounding the failure to appeal directly from the conviction. Therefore, petitioner moved the

for failing to take a direct appeal from the conviction (R. 146). The court ordered a rehearing *en banc* to consider petitioner's reasons for failing to appeal and its possible effect on the court's ruling (R. 146-147).

The circumstances surrounding petitioner's failure to appeal, in brief, are these: Petitioner is a layman with a high school education and no knowledge of the law (R. 15). Prior to this time, he had never had a brush with the law more serious than a traffic violation, and was completely unaware of his appellate rights or the necessity of filing a notice of appeal within ten days after his conviction (R. 15).

Petitioner's trial counsel, in sworn statements, admit that they never discussed with petitioner the possibility of taking an appeal, nor the procedure for taking an appeal, despite their "strongly felt" belief that an appeal should be taken[4] (R. 15-16). After petitioner's sentencing, his counsel had no opportunity to speak with or advise the prisoner because he was immediately removed from the courtroom by the marshal (R. 16). Moreover, at this point, counsel apparently considered their representation ter-

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court of appeals further to supplement the record on appeal with affidavits executed by himself and by his trial counsel setting forth the facts surrounding the failure to appeal and the reasons therefor (R. 12-16). A different panel of the court of appeals denied this motion without opinion (R. 22), and, therefore, the panel which heard the case on the merits was apparently unaware of the reasons for petitioner's failure to take a direct appeal.

[4] The majority opinion on the rehearing *en banc* noted that, "If either [of Hodges' trial counsel] had perceived any substantial basis for an appeal, it is almost incredible that Hodges would not have been so advised prior to May 13, the last day for taking an appeal" (R. 151).

The court obviously overlooked the uncontradicted affidavit of petitioner's trial counsel that they "strongly felt" that an appeal should be taken (R. 16).

minated (R. 15-16). It may not be entirely without significance that counsel, although of the defendant's own choosing and not appointed by the court, knew that they would receive no compensation for their services because both the prisoner and his wife were without funds (R. 15-16), and counsel had just completed a five-day trial conducting petitioner's defense (R. 15).

In these circumstances, the ten days elapsed without the filing of a notice of appeal. However, three and one-half months later, petitioner obtained counsel to bring the present motion under Section 2255 (R. 1).

Despite these reasons for failing to appeal, the court of appeals on rehearing again affirmed, three judges dissenting (R. 148-161). The majority ruled that an unappealed conviction based on a coerced confession could not be set aside on a 2255 motion regardless of the reasons for failing to appeal, whether "excusable or not" (R. 151). Nothing short of Government obstruction of appellate review would permit collateral attack of an unappealed conviction based on a coerced confession (R. 151).

Judge Fahy, writing for the minority, thought otherwise:

> When in our opinion of December 30, 1959, we adhered to a limitation, not contained in section 2255 itself, but deemed to inhere in the orderly administration of justice; namely, that even in case of such fundamental error collateral attack is unavailable when no appeal was taken and no reason appears for failure to appeal, we went as far I think as the courts can possibly go in restricting the availability of review under section 2255. If the accused did not know and was not advised of his appeal rights, the adjudicatory doors opened by Congress in enacting section 2255,

> like the avenues available under the Great Writ, should not be closed and persons left in prison as a result of violation of their constitutional rights . . . I cannot agree the courts must say to the person imprisoned under a basically invalid sentence that the law affords no remedy because, although he did not know and was not advised of his appeal rights, he should have appealed anyhow (R. 155).

After certiorari was granted, the Chief Justice admitted the petitioner to bail on his showing that he had been a model prisoner during his four-year incarceration and that he was still remembered by his friends and acquaintances as a kind and charitable man, of high moral character and integrity.[5]

Summary of Argument

I

This Court's decisions establish that collateral attack based on a constitutional error is available, even though no direct appeal from the conviction was taken.

In *Sunal* v. *Large*, 332 U.S. 174 (1947), this Court in a 6-3 decision refused to permit a collateral attack grounded on a non-constitutional error because petitioners failed to appeal directly from their federal convictions; but in dicta the Court indicated that if the claimed error had been of

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[5] Petitioner is now employed by Altimont Brothers, Inc., general contractors. Originally he was employed by this concern as a draftsman, a trade he learned while in prison. He is now being trained in estimating the costs of various items in contracts on which his employer is called upon to bid; and, since he was hired in March 1961, he has received two unsolicited $10-a-week raises. Petitioner voluntarily contributes $20 a week to the support of his two children, who are living with his former wife, now remarried, and sees his children weekly.

constitutional proportions, collateral attack would have been permitted. The dictum in the *Sunal* case was converted to holding in *Jordan* v. *United States*, 352 U.S. 904 (1956), where, in a per curiam reversal, the Court ordered consideration of a claim of constitutional deprivation despite a failure to raise the point upon direct appeal from the federal conviction. This ruling was made in the face of the Government's contention in its Brief in Opposition that the error could have and should have been corrected on appeal and for that reason collateral attack should be denied.

In *United States* v. *Robinson*, 361 U.S. 220 (1960), the Court ruled that the filing of a notice of appeal within ten days is jurisdictional and may not be enlarged, even on a finding of excusable neglect. The Court based this ruling in part on the "collateral remedies available to redress denial of basic rights" at any time (361 U.S. at 230, n. 14), again indicating its view that failure to appeal from a federal conviction does not bar collateral attack based on a basic—constitutional—error.

Finally, this Court has on occasion permitted collateral attack of an unappealed federal conviction to correct a mere error of law. *Bowen* v. *Johnston*, 306 U.S. 19 (1939). In *Bowen*, an error of law was considered because it was a recurring and uncertain question. It did not, however, relate to the prisoner's guilt or innocence. How much more compelling is the instant case where the prisoner's claim is a serious constitutional error which relates directly to his guilt or innocence.

II

Unless this collateral remedy is provided, prisoners who have been convicted and imprisoned on the basis of confessions extorted from them against their will, as we must assume, will continue to serve their illegal sentences without redress.

Moreover, a decision in petitioner's favor will not atrophy the appellate process. A prisoner is not likely purposely to reject the appellate route in favor of habeas corpus, nor is he likely to withhold evidence of a constitutional violation so that he may bring it to the court's attention on habeas corpus. The scope of review on habeas corpus is narrow and time is not on the prisoner's side.

Contrary to the suggestion of the majority below, there will be no unusual difficulty in discriminating between meritorious and spurious claims that a confession had been coerced. The burden of proof is on the prisoner. In determining the merits, a court will consider any disadvantage to the Government resulting from a delay in bringing a 2255 motion. The Government also has that most powerful weapon against spurious claims, cross-examination.

Courts have experienced no unusual difficulty in determining whether a claim of coerced plea of guilty is meritorious or not. The problem of discriminating between truth and falsehood in such a case is precisely the same as in a claim of a coerced confession. So far as we are aware, prisoners are not finding an easy exit from their cells on the basis of perjured testimony that their pleas of guilty had been coerced. Nor have the courts been flooded with such motions. In these circumstances, there is no more reason to suspect that a decision, in petitioner's favor here will present the courts with any unusual difficulty.

III

If for no other reason, petitioner's claim in this case must be heard because, as a practical matter, an appeal was simply unavailable to him. This being his first brush with the law, he knew nothing of his appellate rights or of the requirement that a notice of appeal must be filed within ten days. His trial counsel who were serving without compensation, never even mentioned an appeal to him, despite

their "strongly felt" belief that an appeal should be taken. And during the crucial ten-day period for which the Government seeks to hold petitioner accountable, he was without counsel.

How then, can a court refuse to hear the petitioner's claim on the ground that he failed to appeal?

ARGUMENT

Introduction

It may be flatly and categorically stated that a criminal conviction is subject to collateral attack if the conviction was based on a coerced confession. This Court, as well as lower federal courts, have so frequently entertained collateral attack of such a conviction that it can no longer be questioned that this is an appropriate basis for such an attack.* It is accordingly unnecessary to recount and stress

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* See, e.g., *Reck* v. *Pate*, 367 U.S. 433 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Thomas* v. *Arizona*, 356 U.S. 390 (1958); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Stickney* v. *Ellis*, 286 F.2d 755 (5th Cir. 1961), certiorari denied, 365 U.S. 888 (1961) (collateral attack entertained and considered, but denied on the merits); *United States ex rel. Alvarez* v. *Murphy*, 277 F.2d 304 (2d Cir. 1960) (collateral attack entertained and considered, but denied on the merits), certiorari denied, 365 U.S. 871 (1961); *United States* v. *Sain*, 276 F.2d 324 (7th Cir. 1960) certiorari granted sub nom. *Townsend* v. *Sain*, 365 U.S. 866 (1961) (collateral attack entertained and considered, but denied on the merits); *United States ex rel. Corbo* v. *La Vallee*, 270 F.2d 513 (2d Cir. 1959), certiorari denied, 361 U.S. 950 (1960); *United States ex rel. Eckwerth* v. *Denno*, 261 F.2d 511 (2d Cir. 1958), certiorari denied, 358 U.S. 945 (1959) (collateral attack entertained and considered, but denied on the merits); *United States* v. *Jackson*, 256 F.2d 7 (2d Cir. 1958), certiorari denied, 357 U.S. 908 (1958); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955), certiorari denied, 350 U.S. 896 (1955); *United States ex rel. Kiernan* v. *La Vallee*, 191 F. Supp. 455 (D.C.N.D. N.Y. 1961); *United States ex rel. Martin* v. *Murphy*, 187 F. Supp. 395 (D.C.N.D. N.Y. 1960) (collateral attack enter-

here how abhorrent it is to any civilized jurisprudence to permit a conviction based on a coerced confession.[7]

The sole question which the petitioner therefore raises here—a question raised for the first time in this Court—is whether this right collaterally to attack his federal conviction based on a coerced confession is extinguished by his failure to appeal directly from his conviction. It is petitioner's contention that this right is not and should not be curtailed because of the prisoner's failure to appeal directly from his federal conviction.

I.

This Court's Decisions Establish That a Conviction Obtained in Violation of a Constitutional Right Is Subject to Collateral Attack Regardless of the Prisoner's Failure to Appeal.

1. *Sunal* v. *Large*, 332 U.S. 174 (1947), is this Court's most recent discussion of the effect of a failure to appeal on the right of collateral attack. In that case, the petitioners had been convicted for refusal to submit to induction into the armed services and had failed to appeal from their convictions. Subsequently, they sought habeas corpus urg-

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tained and considered, but denied on the merits); *United States ex rel. Wolfe* v. *La Vallee*, 179 F. Supp. 939 (D.C.N.D. N.Y. 1960), certiorari denied sub nom. *Wolfe* v. *New York*, 360 U.S. 913 (1959) (collateral attack entertained and considered, but denied on the merits); *cf. Overman* v. *United States*, 281 F.2d 497 (6th Cir. 1960).

[7] Excellent discussions by this Court of the fundamental invalidity which inheres in such convictions may be found in *Brown* v. *Mississippi*, 297 U.S. 278 (1936) and *Blackburn* v. *Alabama*, 361 U.S. 199, 205 (1960); see also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Spano* v. *New York*, 360 U.S. 315 (1959), and cases cited therein; *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Lisenba* v. *California*, 314 U.S. 219 (1941).

ing that their convictions were invalid because the trial court had erroneously held (1) that their draft classifications were final and not open to attack in the criminal trial and (2) that, therefore, evidence to show that they should have been classified as ministers of religion, rather than 1-A, was inadmissible. It was clear at the time of their habeas corpus petitions that the trial courts had erred in these rulings at their criminal trials. This Court in a 6-3 ruling nevertheless refused to permit a collateral attack.

In deciding that collateral attack was unavailable in the absence of a direct appeal from the conviction, the majority in that case stressed two points. The first was that the district courts' error was not of constitutional proportions; the district courts erred in refusing to admit the proffered evidence regarding the allegedly erroneous draft classification, but this did not infringe a constitutional right. This Court therefore concluded that:

> Wise judicial administration of the federal courts counsels against [collateral attack of a federal conviction], at least where the error does not trench on any constitutional rights of defendants . . . [332 U.S. at 182].

In its careful review of prior cases, the majority recognized that:

> The writ [of habeas corpus] has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional,[8] where

[8] *Ex parte Siebold*, 100 U.S. 371; *Ex parte Curtis*, 106 U.S. 371; *Ex parte Yarbrough*, 110 U.S. 651; *In re Coy*, 127 U.S. 731; *Matter of Heff*, 197 U.S. 488; *Matter of Gregory*, 219 U.S. 210; *Baender* v. *Barnett*, 255 U.S. 224. [Footnote in original]

> there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged,[9] *where the trial or sentence by a federal court violated specific constitutional guaranties*[10] [332 U.S. at 178]. [Emphasis supplied.]

The Court contrasted cases involving constitutional deprivations with cases involving a mere error of law, as was involved in *Sunal*:

> It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court [332 U.S. at 179].

The second point which the majority stressed in *Sunal* was that the decision not to appeal from the criminal conviction was a conscious and deliberate one. The Court stated:

> Defendants had counsel. Nor was there any other barrier to the perfection of their appeals . . . [332

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[9] *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *In re Snow*, 120 U.S. 274 (same); *In re Nielsen*, 131 U.S. 176 (same); *Counselman* v. *Hitchcock*, 142 U.S. 547 (self-incrimination); *Ex parte Wilson*, 114 U.S. 417 (requirement of indictment); *Ex parte Bain*, 121 U.S. 1 (same); *Callan* v. *Wilson*, 127 U.S. 540 (jury trial); *Johnson* v. *Zerbst*, *supra*, (right to counsel); *Walker* v. *Johnston*, 312 U.S. 275 (same); *Waley* v. *Johnston*, [316 U.S. 101] (coerced plea of guilty). [Footnote in original]

[10] *Tinsley* v. *Treat*, 205 U.S. 20 (removal case). In removal cases *habeas corpus* is available not to weigh the evidence to support the accusation but to determine whether there is an entire lack of evidence to support it. *Hyde* v. *Shine*, 199 U.S. 62, 84. It is also available to determine whether removal to the district in question violates a constitutional right of the accused, *Haas* v. *Henkel*, 216 U.S. 462, or whether the court before which it is proposed to take and try the accused has jurisdiction over the offense. *Salinger* v. *Loisel*, 265 U.S. 224. But *habeas corpus* will not be entertained to pass on the question of jurisdiction where it involves consideration of many facts and seriously controverted questions of law. *Rodman* v. *Pothier*, 264 U.S. 399; *Henry* v. *Henkel*, 235 U.S. 219. [Footnote in original]

> U.S. at 177] . . . [S]ince *they chose* not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile [332 U.S. at 181]. [Emphasis supplied.]

The unmistakable implication from the *Sunal* decision is that if the collateral attack had been based on a constitutional error—as it is in the instant case—or if there had been reasonable excuse for failing to appeal—as there is in the instant case—the result would have been different.

2. The implication of the *Sunal* case is fully borne out by *Jordan* v. *United States*, 352 U.S. 904 (1956). In that case the prisoner had been convicted of attempt to commit robbery. Although an appeal was taken from this conviction, the defendant did not then argue, as he could have, that he had been deprived of a speedy trial in violation of his constitutional rights. His conviction was affirmed and he did not seek certiorari.[11] Later he filed a motion under Section 2255 to vacate his sentence on the g[illegible]d, *inter alia*, that he had been denied the speedy trial [illegible] the Constitution guarantees. The Court of Ap[illegible] ruled that this contention could not be raised on a 2[illegible] motion since it could have been, but was not, raised by appeal. The prisoner petitioned for certiorari solely on the ground that his conviction was constitutionally invalid because he had been denied a speedy trial.

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[11] The petitioner thus not only failed to exhaust his direct appellate remedies by not raising the constitutional question on his appeal, but he also failed to exhaust his direct appellate remedies by not seeking review in this Court. *Cf. Darr* v. *Burford*, 339 U.S. 200 (1950).

In its opposition to the petition for certiorari, the Government argued:

> Delay in bringing a case to trial is the type of defense which a defendant who has counsel can raise at the trial and as to which an error can and should be corrected on appeal. For that reason, it is not normally the type of error which can be made a basis for collateral attack. [Brief in Opposition, page 7, No. 119 Misc., 1956 Term.]

This, of course, is the same contention which the Government makes here. In *Jordan* the Court granted the writ and reversed *per curiam* on the petition, thus clearly rejecting the Government's contention. The Court of Appeals for the District of Columbia Circuit has interpreted this Court's *per curiam* order in *Jordan* as follows:

> By reversing and remanding to the District Court for a hearing on the merits the Supreme Court appears to have ruled that failure to raise at trial or on direct appeal a point cognizable under section 2255 is no bar to its consideration in a section 2255 proceeding. [*Askins* v. *United States*, 251 F. 2d 909, 911, n. 3 (D.C. Cir. 1958.]

The *Jordan* case is clearly *a fortiori* to the case at bar and should, we submit, be controlling. No meaningful distinction can be drawn between the case in which an appeal has been taken, but fails to raise the constitutional point, and the case in which no appeal is taken at all. In both cases a constitutional error could have been, but was not, corrected on direct appeal. The policy considerations in determining whether such a constitutional claim may be raised on habeas corpus are identical in both cases.

There are, in addition, several reasons why the instant case is even more compelling than *Jordan*. In the first

place, the prisoner in *Jordan* offered no reason for failing to raise the constitutional validity of his conviction on his appeal; in the instant case, as a practical matter and viewed from the prisoner's individual viewpoint, petitioner had no opportunity to appeal. See, *infra*, pp. 32-33. Secondly, the constitutional defect urged in *Jordan* was unrelated to the prisoner's guilt or innocence; here the prisoner urges that he was convicted on the basis of a coerced confession —a charge which relates directly to his guilt or innocence.

It is therefore clear that unless this Court is to retreat from its holding in *Jordan*, the judgment in this case must be reversed. The Government apparently recognizes this, for despite our heavy reliance on *Jordan* in the petition for certiorari, the Government did not give this case even passing mention in its opposition. In the Court of Appeals too, the Government treated the *Jordan* case by ignoring it.[12]

3. The most recent case in this Court which indicates that constitutional defects in a conviction may be raised on collateral attack regardless of a failure to appeal is *United States* v. *Robinson*, 361 U.S. 220 (1960). The question in *Robinson* was whether the ten-day appeal period in criminal cases may be enlarged on a finding of excusable neglect. The Court held that the ten-day appeal period is jurisdictional and may not be enlarged even on a finding of excusable neglect. It reached this decision in part, however, on a consideration of the complementary flexibility of collateral remedies. Thus, the severity of the jurisdictional bar is not unduly harsh because alleviated by the availability of other collateral remedies. Were this not so, the

[12] The Court of Appeals opinion does not deal with the *Jordan* case either.

result in *Robinson* might have been different. The Court stated:

> The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; *the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. §2255;* and proceedings by way of writ of error coram nobis [361 U.S. at 230, n. 14]. [Emphasis supplied.]

To deny a collateral remedy where the error is as basic as it is in this case simply because the prisoner failed to appeal would be to deny the promise held out by *Robinson*. This is especially true in view of the circumstances of the prisoner's failure to appeal here. See, *infra*, pp. 32-33.

The court below, in a strange turn of logic, has relied on *Robinson* to support its decision, arguing that to permit collateral attack here would "undermine" *Robinson* (R. 152). The difference between permitting collateral attack based on a constitutional deprivation and permitting a late appeal which could raise any kind of error is vast. We can do no better in refuting the argument of the majority below based on *Robinson* than by quoting Judge Fahy's careful discussion of this question in his dissent:

> We are not here concerned with an attempt to appeal out of time because of excusable neglect. We are here concerned with a collateral challenge to a sentence. The time limitation for appeal is rigid and

> jurisdictional, but the scope of review is as broad as the record itself. In contrast there is no time limitation applicable to a section 2255 motion, but the scope of review is narrow. The motion may be filed "at any time"—though I suppose it would not be entertained, as such, but would be treated as an appeal, if filed during the appeal period of ten days. Its limitation is other than that of time; it brings under review only errors of a constitutional, jurisdictional or otherwise fundamental character, such as the admission in evidence of a coerced confession, held by the Supreme Court time and again to violate constitutional rights [R. 154-155].

Thus, a holding in petitioner's favor here would fully comport with the implication of *Robinson;* a decision against him would remove in part the basis on which the majority relied in ruling as it did in *Robinson.*

4. Finally, we would like to stress a significant decision of this Court in which a disputed question of law that could have been settled by appeal was nevertheless entertained and disposed of on a petition for habeas corpus. *Bowen* v. *Johnston,* 306 U.S. 19 (1939). In that case, the prisoner had been convicted of murder in a United States District Court. The murder was alleged to have been committed on land within the exclusive jurisdiction of the United States. Having failed to appeal, the prisoner sought habeas corpus on the ground that the United States had no jurisdiction of the land on which the homicide had occurred. The Government argued that this question could not be raised on collateral attack, but only by writ of error. This Court unanimously rejected the contention despite the Court's acknowledgment that the question of the trial court's jurisdiction "may be the appropriate subject of ap-

pellate review" (306 U.S. at 24). In considering this question of law on habeas corpus, the Court stated:

> It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired . . . The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. *The rule is not one defining power but one which relates to the appropriate exercise of power* [306 U.S. at 26-27]. [Emphasis supplied.]

The reason which the Court gave in *Bowen* for considering a question of law on habeas corpus—that the point is uncertain and confused—is not nearly so compelling as the reasons which petitioner adduces here. Moreover, the question which the petitioner raised in the *Bowen* case was in no way related to the fundamental fairness of the trial; it was a cold question of legal jurisdiction; here petitioner makes a grave constitutional charge which relates directly to the basic fairness of the trial proceeding.

The Court of Appeals for the District of Columbia Circuit has also entertained a collateral attack seeking to set aside a conviction for an error of law which could have been, but was not, corrected on appeal. *Askins* v. *United States,* 251 F.2d 909 (D.C. Cir. 1958). Although an appeal was taken in that case, the defendant failed to raise the question whether his sentence was barred by the statute of limitations in 18 U.S.C. §3282 (1952 ed.).[13] The effect

[13] 18 U.S.C. §3282 (1952 ed.) provided as follows: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indict-

of appellant's failure to raise this point on his appeal was squarely raised by the Government. The Court answered:

> 28 U.S.C. §2255 is plainly designed to permit a question which goes to the validity of the sentence to be raised for decision at any time. When a subject is within the limited class reviewable under section 2255 [as are convictions based on coerced confessions, see *supra*, p. 12], the fact that it is presented for the first time by motion under that section, though it could have been presented at the trial, at the sentencing, or on appeal from the judgment of conviction, is immaterial. *Jordan* v. *United States District Court*, 233 F. 2d 362, reversed on other grounds, 352 U.S. 904[3] [251 F.2d at 911].

Footnote 3:

> Not only does our *Jordan* decision support this proposition but in another portion of the opinion in that case we refrained from reaching under section 2255 the issue of lack of a speedy trial, in the absence of an "extreme case." We said the point was not raised at trial or on the direct appeal. The sole ground presented to the Supreme Court on the petition for certiorari was the denial of a hearing on the issue of a speedy trial. By reversing and remanding to the District Court for a hearing on the merits the Supreme Court appears to have ruled that failure to raise at trial or on direct appeal a point cognizable under section 2255 is no bar to its consideration in a section 2255 proceeding [251 F.2d at 911].

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ment is found or the information is instituted within three years next after such offense shall have been committed." This section has now been amended to increase the statute of limitations to five years. 18 U.S.C. §3282 (1958 ed.).

Thus precedent fully supports petitioner's position here —where a claim is cognizable under section 2255 the failure of a federal prisoner to raise it on direct appeal is no bar to his later raising it on collateral attack.[14]

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[14] Court of Appeals cases involving the availability of collateral attack to set aside convictions based on illegal confessions include *Eury* v. *Huff*, 146 F.2d 17 (D.C. Cir. 1944); *Miller* v. *Hiatt*, 141 F.2d 690 (3d Cir. 1944); *Burall* v. *Johnson*, 134 F.2d 614 (9th Cir. 1943); *Cash* v. *Huff*, 142 F.2d 60 (4th Cir. 1944). These cases were construed in *Smith* v. *United States*, 187 F.2d 192, 197 (D.C. Cir. 1950), certiorari denied, 341 U.S. 927 (1951), as involving "confessions obtained by illegal detention," rather than by coercion. The admission of a confession obtained during illegal detention is not, of course, a constitutional error as is the admission of a coerced confession.

Prior to the decision in *Mallory* v. *United States*, 354 U.S. 449 (1957), at which time all of the preceding cases were decided, there was considerable confusion regarding the distinction between these two types of confessions. See Hogan & Snee, "The McNabb-Mallory Rule," 47 Georgetown L.J. 1 (1958). Some of this confusion is reflected in these cases. However, on close examination it will be seen that the courts in each case were dealing with confessions obtained during illegal detention, rather than coerced confessions, with the exception of *Burall* v. *Johnson*, *supra*. In *Eury*, *Miller*, and *Cash*, the courts specifically treated the cases as *McNabb* problems and found that a *McNabb* confession could not be attacked on habeas corpus.

Burall v. *Johnson*, *supra*, is also easily distinguished. The court there denied the petition because the basis of the attack was not on a jurisdictional ground. Since the decision in the *Burall* case, there has been considerable expansion of the grounds on which collateral attack is available. It is no longer necessary to couch the claim in jurisdictional terms; it is sufficient if a constitutional deprivation is alleged. See "Note on the Sequel to the Johnson Case," Hart & Wechsler, *The Federal Courts and the Federal System*, (1953), p. 1258; Note, "The Freedom Writ—The Expanding Use of Federal Habeas Corpus," 61 Harv. L. Rev. 657, 660ff. (1948).

It is also worthy of mention that all of the Court of Appeals cases cited in this footnote were decided over fifteen years ago. During that time, there has been an unusual development and expansion of the law of federal habeas corpus. Accordingly, these cases are at this time of little significance.

II.

Policy Considerations, as Well as Precedent, Require a Reversal in This Case.

The competing policy considerations which must be balanced in determining the outcome of this case are simply stated:

On the one hand is the fact that, unless this collateral remedy is permitted, innocent men convicted and imprisoned, as we must assume, on the basis of confessions extorted from them against their will, will continue to serve their unjust and illegal sentences without redress. As early as 1936 in *Brown* v. *Mississippi*, 297 U.S. 278, a unanimous Court ruled that a conviction based on a coerced confession made of the trial a "mere pretense." "The rack and torture chamber may not be substituted for the witness stand" (297 U.S. at 285-6).

More recently another unanimous Court ruled that:

> . . . [T]he Fourteenth Amendment is grievously breached when an involuntary confession is . . . introduced into evidence in a criminal prosecution which culminates in a conviction. [*Blackburn* v. *Alabama*, 361 U.S. 199, 205 (1960)]

See also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Lisenba* v. *California*, 314 U.S. 219 (1941); *Spano* v. *New York*, 360 U.S. 315 (1959), and cases cited therein.

It is in the light of this grave charge of constitutional deprivation that we must consider whether petitioner should be permitted to attack his conviction collaterally

despite his failure to appeal. This then is what the prisoner has to place in the balancing scales.

Against this consideration, we must balance what one eminent scholar has called the "time-worn shibboleth"[15] that "habeas corpus cannot be made to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 184 (1947) (dissenting opinion). We propose to examine precisely what considerations are summarized by this formula, reminding ourselves, as Mr. Justice Holmes long ago observed, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde* v. *United States*, 225 U.S. 347, 391 (1912) (dissenting opinion).[16]

It is said that the orderly administration of justice requires the correction of trial errors by appeal where that avenue is available. If by this is meant that habeas corpus will not lie where an appeal is presently available to correct the error, the answer is that in this case an appeal was *not* available at the time collateral relief was sought. The time for appeal had expired three months earlier.

If by this formula is meant that habeas corpus will not lie because at one time—now past—an appeal was available to correct the error, then we must ask why. If the only answer is that abstract considerations of legal symmetry or neatness require it, then it is obvious that the argument must be rejected. Such considerations cannot outweigh the need to provide a remedy for prisoners who have been convicted in violation of their constitutional rights.

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[15] Hart, "Forward: The Time Chart of the Justices, the Supreme Court, 1958 Term," 73 Harv. L. Rev. 84, 118 (1959).

[16] *Cf.* Mr. Justice Brandeis in his unpublished dissent in *Stratton* v. *St. Louis Southwestern Ry.*, "Our effort to reach sound conclusions will be futile if we substitute formulas for reasoning. Formulas block the paths to truth and wisdom." Bickel (ed.), The Unpublished Opinions of Mr. Justice Brandeis 151-2.

Does the argument have more substance than this? We submit that it does not because no prisoner is likely to reject the appellate route in favor of habeas corpus, given the choice.[17] No defendant will pass up the opportunity to appeal and purposely proceed to the penitentiary in order to enjoy the opportunity of bringing habeas corpus to test his contention that his confession was coerced. It is just as unlikely that a defendant will purposely fail to adduce evidence of a constitutional violation so that he may bring it to the court's attention on habeas corpus. As Judge Fahy stated in his dissenting opinion in this case:

> . . . [T]hose under sentence are not likely to think they can gain an advantage by not appealing in time and later resorting to collateral attack. The scope of review is narrow, and time is not on their side [R. 155].

It is thus clear that allowing collateral attack to correct constitutional errors presents no threat to the appellate process. There is no danger that the appellate process will be atrophied or ignored because of the availability of collateral attack. As a practical matter, allowing habeas corpus in these circumstances allows redress only when an appeal is *not* available.

The majority below apparently rests its ruling (1) on the belief that a decision in petitioner's favor would lead to the filing of many more 2255 motions, further increasing the burden such motions already place on the federal courts, and (2) on the belief that it would be difficult to determine the true facts regarding an alleged coerced confession because no time limit is placed on 2255 motions.

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[17] If a prisoner ever consciously and with full knowledge rejected an appeal in order to bring habeas corpus, habeas corpus would properly be denied because of the waiver of the appellate remedy. The plain fact is, that from the defendant's point of view, there is, and can be, no advantage to habeas corpus over appeal.

The first reason is tantamount to saying that the court will not entertain or grant relief on a meritorious claim because doing so would result in the filing of many unmeritorious claims. This, we submit, an American court should never do. If this reasoning were applied across the board, we would simply have to abolish Section 2255; for, as the majority below points out, less than 4 per cent of all 2255 motions are meritorious. Surely, this is no basis for declining to hear a claim that does have merit.

As to the court's second reason, namely, that it will be difficult to determine which claims are meritorious, the court suggests that, after detention in a federal penitentiary, the prisoner may not be impressed with the risk of committing perjury in framing his petition. "He is frequently advised by a 'jail-house lawyer' who may encourage him to embroider his story or to attack the good faith and diligence of his counsel" (R. 150). The court also suggests that allowing collateral attack would require factual determinations to be made "at a time when recollections may have dimmed and witnesses may have disappeared" (R. 151).

Commonly faced with such difficulties, our courts have always been able to discriminate between truth and falsehood. There are many safeguards against the prisoner's gaining advantage from his own perjury or the passage of time. The burden of establishing his case is on the prisoner; by contrast, in his criminal trial he need only raise a reasonable doubt. In determining the facts, the court must appropriately consider the lapse of time between the prisoner's commitment and his bringing habeas corpus.[17a] The court should also consider any disadvantage resulting to the Government from a delay in bringing a 2255 motion.

[17a] In this case, only three months elapsed (R. 1).

The movant would also be under a duty to explain his failure—if such be the case—to raise the question of his coerced confession at his trial, or his failure—if such be the case—to adduce at trial the evidence which he presents on collateral attack. Finally, the Government has available that most powerful weapon against perjury, cross-examination. These considerations make it clear that the disadvantage, if disadvantage there be, lies with the prisoner who must on collateral attack inevitably find it more difficult to prove his case. With all these safeguards, we cannot assume that prisoners willing to perjure themselves will here find an easy exit from their cells.

The same problems facing a court in determining on collateral attack whether a confession was in fact coerced also face the court in determining whether a plea of guilty was coerced. A plea of guilty may, of course, be attacked collaterally on the ground that it was coerced.[18] The number of prisoners serving sentences under pleas of guilty probably exceeds those who have been convicted after a trial. Yet, these decisions permitting collateral attack of coerced pleas of guilty have not opened the floodgates. The courts have not, so far as we are aware, found any unusual difficulty in determining whether a claim of a coerced plea of guilty is meritorious or spurious. Those accused of crime are not pleading guilty in the hope of obtaining their release on the basis of perjured claims that their plea had been coerced. In short, the spectre raised by the court below is insubstantial. A decision in the prisoner's favor here would not significantly affect the burden on the courts, but it would provide an avenue of relief for those prisoners

[18] E.g. *Waley* v. *Johnston*, 316 U.S. 101 (1942); *Walker* v. *Johnston*, 312 U.S. 275 (1941); *Thomas* v. *United States*, 271 F.2d 500 (D.C. Cir. 1959); *Overman* v. *United States*, 281 F.2d 497 (6th Cir. 1960).

whose unappealed conviction was based on a coerced confession.

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Finally, a word should be added concerning the distinction between cases arising under Section 2255 involving federal prisoners and cases arising under Section 2254 involving state prisoners as regards the effect of a failure to take a direct appeal from the conviction or to raise all constitutional issues on the appeal. The effect of a state prisoner's failure to obtain a direct appellate ruling on a constitutional claim before seeking federal habeas corpus has presented this Court with some of its thorniest problems. See *Brown* v. *Allen*, 344 U.S. 443 (1953); *Daniels* v. *Allen*, reported with *Brown* v. *Allen*, 344 U.S. 443 (1953); *Irvin* v. *Dowd*, 359 U.S. 394 (1959). The difficulties—both conceptional and practical—with which this problem bristles are reflected in the rash of scholarly discussions which these decisions have evoked. See, e.g., Hart, "Forward: The Time Chart of the Justices, The Supreme Court, 1958 Term," 73 Harv. L. Rev. 84 (1959); Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298 (1960); Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," 74 Harv. L. Rev. 1315 (1961). In these eminent and scholarly discussions, the suggestion is made that even in the case of state prisoners this Court has too severely restricted on procedural grounds its review of alleged constitutional deprivations. For example, Judge Arnold has written:

> I submit . . . that rules for governing the allocation of judicial business as between the federal and state courts should not be applied so as to deny a man whose life is at stake a hearing on a constitutional claim [Arnold, *supra*, at 1310].

Whatever may be said of the case of a state prisoner, it should be stressed here that the case of a federal prisoner who brings a 2255 motion is far easier than the state prisoner. The major stumbling block to reviewing a state prisoner's constitutional claim on federal habeas corpus when he has failed to exhaust his state remedies is the delicate balance of state as opposed to federal concerns in a federal system. This balance is specifically written into Section 2254 by an express requirement that relief ". . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state . . ." No such balancing is required in the case of a federal prisoner. Here we are dealing with a single judicial system. The problems which frequently arise when two judicial systems share the total administrative burden are wholly absent.

This Court has frequently recognized that "its corrective power over state courts in criminal cases is narrower than that which it exercises over the lower federal courts." *Fikes* v. *Alabama*, 352 U.S. 191, 200 (1957) (dissenting opinion). In reviewing a state conviction, a federal court must be mindful that with "the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935). "Power of such delicacy and import [i.e. to review state convictions] must, of course, be exercised with the greatest forbearance." *Watts* v. *Indiana*, 338 U.S. 49, 50 (1949).

But such considerations as these need not concern us in this case. Admittedly, the Court has the power to consider this prisoner's claim of constitutional deprivation. *Bowen* v. *Johnston*, 306 U.S. 19, 26-27 (1939). Only the exercise of the Court's sound discretion is involved. Absent any problems of federalism, the Court is free to "dispose of the party as law and justice require." *United States* v. *Hayman*, 342 U.S. 205, 211 (1952).

III.

Petitioner's Claim Should Be Heard on Collateral Attack Because, as a Practical Matter, No Appellate Remedy Was Available to Him.

We now turn to petitioner's reasons for failing to prosecute a direct appeal from his conviction. Thus far in our argument we have not stressed these reasons. In view of the considerations which we set forth in a footnote,[19] we believe the wiser decision of this Court would permit collateral without a showing of the reasons for failing to take a direct appeal when the basis of the attack is a constitutional deprivation.[20]

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[19] We are aware that this Court normally attempts to base its decision on the narrowest available ground, not the broadest; however, in this case, we believe there are cogent reasons for ruling that collateral attack is available to correct constitutional errors in an unappealed federal conviction, regardless of the reasons for failing to appeal.

In the first place, this issue is presently before the Court on a petition for certiorari in *Lampe* v. *United States*, No. 400 Misc., Oct. T. 1961. In the *Lampe* case an appeal was taken from the conviction, but the defendant failed to raise the constitutional issue which he raised on collateral attack. He offers no reason for failing to raise the constitutional issue on his appeal. Accordingly, the *Lampe* case cannot be disposed of on the narrow ground available here—namely, the petitioner's reasons for not appealing.

Secondly, a reversal in this case based on the petitioner's reasons for failing to appeal will require the development of a jurisprudence defining circumstances in which a failure to appeal will be excused so as to permit collateral attack. Wise judicial administration counsels a decision on the broader question so as, if possible, to avoid needlessly expending judicial energy on the development of the aforementioned jurisprudence. This is especially true since the broader question is a recurring one.

[20] If, however, the Government showed a conscious and deliberate waiver of appeal, collateral attack should not be permitted. See *supra*, p. 26, n. 17.

Whether this Court grounds its reversal on that basis, or whether, in addition, it requires a reasonable excuse for failing to appeal is simply a question of how much the Court will require before considering on collateral attack a prisoner's claim that his conviction was based on a coerced confession. We believe the considerations we have already presented require a court to consider such a claim. The additional considerations we now turn to make the result conclusive.

Petitioner's reasons for failing to appeal from his conviction compel a reversal in this case because, as a practical matter, his direct appellate remedy was simply not available to him. This being his first brush with the law, he knew nothing of his appellate rights or the necessity of filing a notice of appeal within ten days. His attorneys, who had just completed a five-day trial in his defense and who knew that they were not to be compensated for their efforts, failed to advise petitioner of his appellate rights, despite their "strongly felt" belief that an appeal should be taken. This frank admission in sworn statements of petitioner's attorneys leaves no doubt as to these facts.

Thus from petitioner's own personal point of view—and this must be our viewpoint here[21]—an appeal from his

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[21] Traditionally courts have considered the effect that should be given procedural errors in criminal cases from the defendant's own point of view, rather than that of his counsel.

For example, where a court of appeals was unable to find that counsel's failure to file the record on appeal in a criminal case constituted excusable neglect, it nevertheless, *sua sponte*, exercised its power to enlarge the time for filing the record on appeal so as to permit an appeal to be heard. In so doing, the Court stressed that counsel's error should not be visited upon the defendant where serious doubt existed concerning the validity of the conviction. The Court stated:

> . . . [T]he instant case involves substantial questions. This court so ruled in granting bail under Rule 46 (a) (2) of the Federal Rules of Criminal Procedure. And in a criminal case in which a sentence of imprisonment is involved, there

criminal conviction was unavailable. By himself he was incapable of doing anything; during the crucial ten-day period for which the Government seeks to hold him accountable, he was without counsel; and his trial counsel had not even mentioned to him the possibility of an appeal.

As Judge Fahy so forcefully stated in his dissent below:

> I cannot agree the courts must say to the person imprisoned under a basically invalid sentence that the law affords no remedy because, although he did not know and was not advised of his appeal rights, he should have appealed anyhow [R. 155].

The circumstances surrounding petitioner's failure to appeal brings this case well within the ambit of this Court's statement in *Brown* v. *Allen*, 344 U.S. 443, 485-6 (1953):

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is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such a penalty for the crime charged.

• • • • •

There is nothing in the record to show that the appellant was personally neglectful of the appeal or that he had, prior to their failure to file the record in time or within time to apply for an extension, any reason to doubt that his counsel would give due attention to the appeal. We think that under these circumstances to dismiss the appeal because of counsel's failure to file the record in time and thereby to subject the appellant to imprisonment without consideration of the substantial questions in the case would be a miscarriage of justice which should not be permitted to occur. [*Christoffel* v. *United States*, 190 F.2d 585, 590, 594 (D.C. Cir. 1950).]

Time and again courts have refused in criminal proceedings to construe technical requirements strictly in their attempt to assure that criminal defendants are not denied full consideration of their claims of error. See, e.g., *Boykin* v. *Huff*, 121 F.2d 865 (D.C. Cir. 1941) (holding that a letter addressed to the trial judge constituted the filing of a notice of appeal); *Oddo* v. *United States*, 171 F.2d 854 (2d Cir. 1949) (holding that the time for filing the notice of appeal did not begin to run until the receipt of the notice required by Rule 49 (c), F.R.Cr.P.).

> . . . [F]ederal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, *incapacity* or some interference by officials. [Emphasis supplied.]

Thus, if for no other reason than that an appeal was as a practical matter unavailable in this case, the prisoner's claim of constitutional deprivation must be heard.

Conclusion

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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